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ATTORNEY FOR APPELLANT:

MARLA R. THOMAS

Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER

Attorney General of Indiana

KELLY A. MIKLOS

Deputy Attorney General

Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JIMMY BRANTLEY,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0512-CR-1161

APPEAL FROM THE MARION SUPERIOR COURT

The Honorable William E. Young, Judge

Cause No. 49G20-0405-FA-89958

October 26, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Jimmy Brantley brings this interlocutory appeal from the trial court's order denying his motion to suppress evidence. Brantley presents a single issue for our review, namely, whether probable cause existed to support the search warrant for his residence.

We reverse.

FACTS AND PROCEDURAL HISTORY

Between January of 2003 and May of 2004, Detective Sergeant Philip Smiley of the Indianapolis Police Department conducted an investigation into an operation believed to involve the distribution of cocaine. Detective Smiley's investigation primarily focused on two individuals, one named Dramane Johnson. Between December of 2003 and April of 2004, Johnson averaged over 100 telephone calls per day, and Detective Smiley listened to all of those conversations. At that time, Detective Smiley had been a police officer for twenty-nine years, had investigated illegal narcotics activity for seventeen, and had been involved in over 100 narcotics investigations. In listening to Johnson's daily calls, Detective Smiley identified drug transactions despite the use of coded or unspecific language. Following those telephone calls, Johnson would arrange meetings to distribute cocaine. Johnson would meet buyers either at his residence, in parking lots, or on side streets, and the meetings would be brief.

On March 26, 2004, Detective Smiley listened to a phone conversation between Johnson and Brantley. Fifty-two days later, on May 17, 2004, Detective Smiley submitted to the trial court a Probable Cause Affidavit ("the Affidavit") in support of a search warrant request, and the trial court issued the warrant. The warrant authorized the

search of several residences, including 3643 North Keystone Avenue in Indianapolis, Brantley's residence. Regarding Brantley and his residence, Detective Smiley stated the following in the Affidavit:

During the course of this investigation this affiant became aware of a subject named Jimmy Brantley. This affiant listened to a phone call made to Dramane Johnson on March 26, 2004[,] at 10:04 a[.]m[.] from [a specific] telephone number Dramane Johnson asked the caller if he needed him and the caller said yes[;] Johnson then told the caller he [would] be at E. 38th Street and North Emerson Avenue. This conversation shows this affiant that Dramane Johnson immediately knew who[m] he was talking to and what they wanted. Surveillance units then followed Dramane Johnson to the parking lot Johnson parked next to [a] silver Ford Expedition with [an] Indiana License plate number . . . at 10:24 a[.]m[.] A [man] then exited the Expedition and got into Johnson's vehicle[.] A few minutes later the subject got out of Johnson's [vehicle.] Johnson then drove off. The subscriber to the above telephone number is Jimmy Brantley. The above Expedition is registered to Kateacha Brantley. This affiant found a Jimmy Brantley . . . in the Indianapolis Police Department computer records. This affiant obtained a picture from the IPD computer records of Jimmy Brantley and compared it to the above description of the subject who met with Dramane Johnson. This affiant identified the subject videoed as the same Jimmy Brantley. . . . This affiant found Jimmy Brantley's driver[']s record, listing 3643 N. Keystone Avenue [as his address]. Surveillance units were able to locate the above mention[ed] Expedition on several occasions in the driveway of 3643 N. Keystone Avenue

* * *

3643 N. Keystone, Indianapolis, Marion County, Indiana is described as a single family ranch style dwelling with light gray vinyl siding and black trim with black shutters [sic]. Gray shingled roof and covered porch with white pillars. The numerals 3643 in gold affixed to one of the pillars. There is a black storm front door. Detached light gray garage.

* * *

I request the search to include all rooms, closets, drawers, shelves, and personal effects contained therein and thereupon where proceeds, moneys, documents, papers, letters, ledgers, and paraphernalia of illegal drug trafficking may be concealed.

Appellant's App. at 39-40, 42 (emphasis added).

On May 18, police searched Brantley's residence and found "various items used to manufacture and process cocaine . . . \$1,900 . . . [and] cocaine in the amount of 52.33 grams." Id. at 18-19. On May 21, the State charged Brantley with Dealing in Cocaine, as a Class A felony, and Possession of Cocaine, as a Class C felony. On June 14, 2005, Brantley moved to suppress the evidence seized from his residence. The trial court denied his motion and certified its order for interlocutory appeal, which we accepted.

DISCUSSION AND DECISION

In deciding whether to issue a search warrant, the task of the issuing magistrate is to make a practical, common sense decision whether, given all the circumstances set forth in the probable cause affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Query v. State, 745 N.E.2d 769, 771 (Ind. 2001) (citing Illinois v. Gates, 462 U.S. 213, 238 (1983)); Hensley v. State, 778 N.E.2d 484, 487 (Ind. Ct. App. 2002). A reviewing court is required to determine whether the magistrate had a "substantial basis" for concluding that probable cause existed. Query, 745 N.E.2d at 771 (quoting Gates, 462 U.S. at 238-39). A substantial basis requires the reviewing court, with significant deference to the magistrate's determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the determination of probable cause. Id. "A 'reviewing court' for these purposes includes both the trial court ruling on a motion to suppress and an appellate court reviewing that decision." Id. In our review, we consider only the evidence presented to the issuing magistrate and may not consider post hoc justifications for the search. Id.

Indiana Code Section 35-33-5-2 governs affidavits used to obtain search warrants and provides in pertinent part:

- (a) Except as provided in section 8 of this chapter, no warrant for search or arrest shall be issued until there is filed with the judge an affidavit:
 - (1) particularly describing:
 - (A) the house or place to be searched and the things to be searched for; or
 - (B) particularly describing the person to be arrested;
 - (2) alleging substantially the offense in relation thereto and that the affiant believes and has good cause to believe that:
 - (A) the things as are to be searched for are there concealed; or
 - (B) the person to be arrested committed the offense; and
 - (3) setting forth the facts then in knowledge of the affiant or information based on hearsay, constituting the probable cause.

“An affidavit demonstrates probable cause to search premises if it provides a sufficient basis of fact to permit a reasonably prudent person to believe that a search of those premises will uncover evidence of a crime.” Hensley, 778 N.E.2d at 488 (quoting Utey v. State, 589 N.E.2d 232, 236 (Ind. 1992)).

Here, the facts attested to in the affidavit existed on March 26, 2004, and not on May 17, 2004, when the showing was made for the warrant. “The right to issue a search warrant rests upon facts existing at the time the showing is made for the warrant.” Ashley v. State, 251 Ind. 359, 368, 241 N.E.2d 264, 269 (1968). See also Overstreet v. State, 783 N.E.2d 1140, 1159 (Ind. 2003) (citing Ashley for the proposition that “[w]e have also found unreasonable searches where the search warrant was stale.”). In Ashley, our supreme court was asked to quash an affidavit for a search warrant when the affidavit

was based on police observations that the defendant had dealt in marijuana on October 3, 1964, but the police did not seek a search warrant until October 11, 1964. In discussing the validity of the issued warrant on those facts, our supreme court stated:

Although there can be no precise rule as to how much time may intervene between the obtaining of the facts and the issuance of the search warrant, in dealing with a substance like marihuana, which can be easily concealed and moved about, probable cause to believe that it was in a certain building on the third of the month is not probable cause to believe that it will be in the same building eight days later. Therefore, since the affidavit only made a showing of probable cause existing on October 3, 1964, and not on October 11, 1964, when the search warrant was issued, the search warrant was defective and it was error to deny appellant's motions to quash the affidavit for the search warrant and to suppress the evidence thereunder seized.

Id.

Ashley controls the facts of the instant case. Detective Smiley observed Brantley's purported illegal activity on March 26, 2004, yet waited fifty-two days before seeking a warrant to search Brantley's residence. Further, Detective Smiley sought evidence relating to illegal drugs, which, as stated in Ashley in the specific context of marijuana, can be easily concealed and moved about. Nor does the affidavit contain any statements indicating contact between Brantley and Johnson either before or after March 26. Hence, the information in the probable cause affidavit that was the basis for the search warrant of Brantley's residence was stale. Thus, the search warrant was defective, and the trial court's denial of Brantley's motion to suppress the evidence seized must be reversed.

Reversed.

DARDEN, J., and BAKER, J., concur.